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Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

CHARLES D. GIANETTI, M. D.

V.

ANTHEM BLUE CROSS AND BLUE SHIELD
OF CONNECTICUT AND
CYNTHIA BELLAMY AND SAMARIS ROSE

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
SECOND CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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1. Does Connecticut General Statutes Section 20-7f(b) ("C. G. S. Sec. 20-7f(b)"):

A. deprive the plaintiff-appellant of substantive due process in violation of the Fifth and Fourteenth Amendments of the U. S. Constitution?; and

B. deprive the plaintiff-appellant of procedural due process in violation of the Fifth and Fourteenth Amendments of the U. S. Constitution?

2. Has the Court Of Appeals for the Second Circuit deprived the plaintiff-appellant of due process by failing to reverse the erroneous dismissal by the District Court of the counts of the Complaint as to defendants Cynthia Bellamy and Samaris Rose?

3. Has the Court Of Appeals for the Second Circuit deprived the plaintiff-appellant of due process by failing to reverse the dismissal of the counts of the Complaint as to defendant Anthem Blue Cross and Blue Shield of Connecticut, Inc.?

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## BASIS FOR JURISDICTION

The Court Of Appeals for the Second Circuit affirmed the erroneous dismissal of the District Court, and denied plaintiff-appellant's Petition For Rehearing En Banc. This petition is from a final order that disposes of all claims with respect to all parties, and is filed pursuant to 28 U.S.C.A. Sect. 1254 (1).

The Fifth and Fourteenth Amendments of the United States Constitution hold, in pertinent part, "...nor shall any person ...be deprived of life, liberty, or property without due process of Law...," and the Fourteenth Amendment further states, " No state shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

Plaintiff Charles D. Gianetti, M.D., brought this action against defendants Blue Cross and Blue Shield of Connecticut, Inc., Anthem Health Plans, Inc., Anthem Insurance Companies, Inc., (collectively, "defendant Anthem" or "Anthem"), as well as defendants Samaris Rose ("Rose") and Cynthia Bellamy ("Bellamy"), in Bridgeport Superior Court for state law claims of breach of contract, quantum meruit, unjust enrichment, fraud and misrepresentation, and violations of the Connecticut Unfair Trade Practices Act ("CUTPA"). Defendant Anthem removed the action to the District Court on the grounds that plaintiff's claims are preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sec. 1001, *et seq.* (2000) ("ERISA") and the claims raise substantial federal questions. Defendant Anthem filed a Motion to Dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6). Defendants Cynthia Bellamy and Samaris Rose have not appeared, and have never filed any pleading, including a motion to dismiss. A motion to dismiss was granted as to all claims and all defendants, by the United States District Court, District of Connecticut, Judge Peter C. Dorsey. An appeal was filed with the Second Circuit Court of Appeals, which issued a Summary Order affirming the decision of the District Court. A Petition For Rehearing En Banc was denied by the Court of Appeals (Appendix E).

ARGUMENT

**1. C. G. S. Sec. 20-7f(b) violates the U. S. Constitution.**

**A. Denial of substantive due process.**

The standard of review is strict scrutiny.

Plaintiff-appellant asserts, *inter alia*, a breach of contract claim against Bellamy and Rose [Complaint, Count Two] (Appendix A). The District Court invoked supplemental jurisdiction over plaintiff-appellant's state law claims as to defendants Bellamy and Rose [Ruling On Motion To Dismiss ("Ruling"), p. 14] (Appendix B, p. B 6). The breach of contract claim is based, among other reasons, on the statement signed by both defendant Rose and defendant Bellamy on behalf of defendant Rose. The statement reads in pertinent part, "I understand that I am responsible for the payment of all fees regardless of insurance." Plaintiff-appellant alleges that defendants Bellamy and Rose breached their contract with plaintiff-appellant by failing to pay the amount due after defendant Anthem's payment (Appendix A, para 15).

The District Court simply and arbitrarily made the unequivocal finding that, based on C.G.S. Sec. 20-7f(b), "Bellamy and Rose are not liable under the contract." (Appendix B, p. B 8). The Court then cites C.G.S. Sec. 20-7f(b) which states, "It shall be an unfair trade practice in violation of Chapter 735a [Conn. Gen. Stat. Sec 42-110a, *et seq.*] for any health care provider to request payment from an enrollee, other than a co-payment or deductible for medical services covered under a managed care plan." C.G.S. 20-7f(b) is the quintessential "guilty under proven innocent" law.

While it is the duty of all courts, both state and federal, to uphold and enforce the U.S. Constitution [*Snypp v. State of Ohio*, 70 F.2d 535 (C.C.A. 6th Cir. 1934)], it is the special office of the federal courts [*Michigan Cent. R. Co. v. Powers*, 201 U.S. 245, 26 S. Ct. 459, 50 L.Ed, 744 (1906)], with final jurisdiction in the United States Supreme Court [*U.S. v. Rumely*, 345 U.S. 41, 73 S. Ct. 543 97 L. Ed. 770 (1953)], to declare unconstitutional acts of state legislatures [*Shelly v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A.L.R. 2d 441 (1948)], that are in contravention of the U.S. Constitution.

C.G.S. Sec. 20-7f(b) is unconstitutional for the following reasons. The Fourteenth Amendment of the United States Constitution holds, " No state shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws." The equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the government. It does not reject the government's ability to classify persons in creating and applying laws but it does guarantee that those classifications will not be used to arbitrarily burden a group of individuals. Strict scrutiny analysis is required of a legislative classification where, as here, the classification impermissibly interferes with the exercise of a fundamental right and/or operates to the disadvantage of a suspect class [*Regan v. Taxation With Representation of Washington*, 1983-2 C.b. 90,461 U.S. 540, 103 S. Ct. 1997, 76 L.Ed. 2d 129 (1983)].

Some legislative acts, such as C.G.S. Sec. 20-7f(b), have a classification (here it is "any health care provider") to be tested under the equal protection guarantee.

Plaintiff-appellant is a health care provider and C.G.S. Sec. 20-7(f)(b) applies to the entire class of

health care providers ("any health care provider"). Any health care provider is a "suspect classification."

> The Court has consistently emphasized that a State which adopts a suspect classification "bears a heavy burden of justification," *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S. Ct. 283, 290, 13 L.Ed. 2nd 222(1964): a burden which, though variously formulated, requires the State to meet certain standards of proof. In order to justify the use of a suspect classification a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification if" necessary. . . to the accomplishment" of its purpose or the safeguarding of its interest *Application of Griffiths*, 413 U.S. 717, S. Ct. 2851, 37 L. Ed. 2d 910 (1973). [Footnotes omitted].

*In Re Griffiths*, 413 U.S. 723, 93 S. Ct. 2851 (1973).

For strict scrutiny analysis to apply, the right asserted must be one that is explicitly or implicitly guaranteed by the Constitution [*U.S. v. Conant*, 116 F.Supp. 2d 1015 (E.D. Wis. 2000); *Raycom Nat., Inc. v. Campbell*, 361 F. Supp.2d 679 (N.D. Ohio 2004)], and the classification must significantly interfere with the exercise of that right [*Sturgell v. Creasy*, 640 F.2d 843 (6th Cir. 1981)].

Liberty to contract is a basic, fundamental and highly important right. The principle, by and large, is that the making of contracts shall be free of governmental interference [*Kealey Pharmacy & Home Care Service, Inc. v. Walgreen Co.*, 539 F. Supp. 1357 (W.D. Wis. 1982), judgment aff'd 761 F.2d 345 (7th Cir. (1985)].

> The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts. *Printing Company v. Sampson*, L.R. 19 Eq. 462, 465. *Baltimore & Ohio Southwestern Ry v. Voigt*, 176 U.S. 498, 505.

*Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 51 S. Ct. 476 (1931).

It is conceivable, and in fact likely, that there are many instances, such as in this case, where services are not covered under a managed care plan, and/or if there is a managed care plan, there are other sources of payment. Contracts may be negotiated between the parties in reference to other payments. For example, in this case, the patient was involved in a motor vehicle accident, and there may be may be other coverage available for the medical services performed for defendant Rose. Not only should a health care provider, including the plaintiff-appellant, have the right to negotiate a contract, but a patient also has the right to become a party to a contract which they deem to be in their best interest.

The Fourteenth Amendment further holds, "...nor shall any State deprive any person of life, liberty, or property, without due process of law..." C.G.S. Sec. 20-7f(b) thereby has an additional inherent lack of substantive due process in simply arbitrarily proscribing any action to secure payment to which a party is otherwise entitled. In this case there is no allegation or any indication whatsoever that the insurance coverage for defendant Rose involves a managed care plan.

The right of private property is a fundamental [*New York State Commission v. Pelham Hall*

*Apartments, Inc.* 10 Misc. 2d 334, 170 N.Y.S.2d 750 (Sup. 1958)] sacred, natural, inherent, and inalienable right, the protection of which is one of the most important purposes of government. It is a common law right, which existed before the adoption of the federal and state constitutions [*Grubel v. MacLaughlin*, 286 F. Supp. 24 (D.V.I. 1968)], and is not dependent on them for its existence [*Culp v. U. S.*, 131 F.2d 93 (C.C.A. 8th Cir. 1942)]. The constitutional right of private property embraces every species of property recognized by law with all right incident thereto and as protected by the various constitutions, property is more than a mere thing which a person owns [*U.S. v. Carolene Products Co*, 7 F. Supp., 500 (S.D. Ill. 1934)].

Here plaintiff-appellant is deprived of the property to which he is entitled, *i.e.*, his medical fees.

The constitutional provisions for the protection of property should be liberally construed in favor of the right of property [*Knoll Associates, Inc. v. F. T. C.* 397 F.2d 530 (7th Cir. 1968)]. The right to private property and its incidents is embraced within the guarantee of liberty, and statutes which violate the constitutional guaranties are null and void.

As to the "preliminary matter" of the unconstitutionality of C.G.S. Sect. 20-7f(b) (Summary Order ["SO"], pp. 2-3)(Appendix C, p. C 2), with its inherent substantive lack of due process, and the prevention of its challenge because it was not argued before the District Court, any question of constitutionality did not arise until after the District Court's decision, by which the plaintiff-appellant was simply denied any hearing before the District Court. Plaintiff-appellant had requested oral argument in his Objection To Motion To Dismiss of defendant Anthem.

The Court of Appeals cites (Appendix C, p. C 3)

Singleton v. Wulff, 428 U.S. 106, 121 (1976), in which the Supreme Court held:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, see *Turner* v. *City of Memphis*, 369 U. S. 350 (1962), or where "injustice might otherwise result." *Hormel* v. *Helvering*, 312 U. S. at 557 [footnote omitted].

This is such a case. Since plaintiff-appellant never had the opportunity to present any argument before the District Court, there certainly could not have been argument about a constitutional issue.

In State v. Brooks, 142 Wash.App. 842, 176 P.3d 549 (Div. 3 2008), the court held that an error raised for the first time on appeal which alleges an invasion of a basic constitutional right will be reviewed to prevent an obvious and manifest injustice. This Court, in Saunders v. Shaw, 244 U.S. 317, 37 S. Ct. 638 (1917), held :

> But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the

> party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance.

For all the above reasons, this Court should find C.G.S. 20-7f(b) unconstitutional.

**B. Denial of procedural due process.**

The standard of review is strict scrutiny.

The inherent substantive unconstitutionality of C.G.S. Sec. 20-7f(b) is addressed in 1., *supra*. When a Court reviews a law to determine its procedural fairness, it reviews the system of decision-making to determine whether or not a government entity has taken an individual life, liberty, or property without the fair procedure or "due process" required by the Fifth and Fourteenth Amendments. [No person shall be...deprived of life, liberty or property, without due process of law...." U.S. Cons. amend. 5. "[N]or shall any State deprive any person of life, liberty, or property, without due process of Law...." U.S. Const. amend, 14, Sec. 1.]. There is no provision for fair procedure or "due process" in C.G.S. 20-7f(b).

The District Court, affirmed by the Court of Appeals, arbitrarily denied any and all constitutional due process rights, including substantive rights, as in A, *supra*. The Court of Appeals does not address the dismissal of the claims as to defendants Bellamy and Rose in its Summary Order (Appendix C).

As to the failure of the Court of Appeals to address the dismissal of claims as to Bellamy and Rose,

the Court of Appeals noted the assumed familiarity of the parties with the underlying facts, the procedural history, and the issues on appeal, but did not itself have a proper grasp of the entire matter, resulting in its erroneous decision.

**2. The District Court, with affirmation by the Court Of Appeals for the Second Circuit, denied the plaintiff-appellant's constitutional due process rights by the wrongful dismissal.**

The District Court has simply arbitrarily and unreasonably denied any further proceedings, thereby depriving plaintiff-appellant of his due process constitutional rights. The District Court (Dorsey, J) attempted to justify the unwarranted dismissal by improperly invoking Federal Rule Of Civil Procedure 12(b)(6) to dismiss plaintiff-appellant's Complaint. (Appendix B, p. B 4). However, the Court of Appeals has held:

> This court reviews the dismissal of a complaint under Rule 12(b) de novo, taking as true all material facts alleged in the complaint and drawing all reasonable inferences in favor of the plaintiff. See *Desiano v. Warner-Lambert Co.*, 326 F.3d 339, 347 (2d Cir. 2003).

*Leonard R. Whitfield, Petitioner, vs. Floyd G. Bennett,* No. 01-CV-0914 (VEB), 2007 U,S. Dist. LEXIS 81269*; United States District Court For The Western District of New York, 2007 U.S. Dist. LEXIS 81269, October 2007, Decided, October 2007, Filed.

In its Ruling On Motion To Dismiss the District Court states, "For the reasons stated herein, Plaintiff's claims against Defendants Bellamy and Rose are dismissed pursuant to Federal Rule of Civil Procedure

12(b)(6)." [Ruling, p. 16] (Appendix B, p. B 9). However, Rule 12(a)(1) provides, "...a defendant shall serve an answer (A) within 20 days after being served with the summons and complaint..." Rule 12(b) states, *inter alia*, ... "Every defense...shall be asserted in the responsive pleading thereto ..." In this case defendants Bellamy and Rose have not filed an answer or defense, let alone a motion to dismiss. Since as clearly and completely set forth in plaintiff-appellant's Brief (pp. 3, 7, 12, 24-25) (Appendix F, pp. F 2-6), there is unequivocally no evidence that C.G.S. 20-7f(b) applies to defendants Bellamy and Rose, the claims of plaintiff-appellant in the Complaint were and are proper, viable and valid. Thus, there is absolutely no reason for dismissal of the claims against defendants Bellamy and Rose under Rule 12(b)(6).

As to the claims against defendant Anthem that plaintiff concedes are governed by ERISA, they are the reason plaintiff-appellant requested leave to amend. The reasons leave to amend should be granted are set forth in under 3., *infra*.

The District Court states in its ruling [p. 16] (Appendix B, p. B 9), "Plaintiff's claims against Bellamy may be time barred..." The state law cited, C.G.S. Sec. 52-576(a), Statute of Limitations,

> (a) No action for an account, or on any simple or implied contract in writing shall be brought within six years after the right of action accrues, except as provided in subsection (b) of this section,

is silent as to quantum meruit and unjust enrichment claims.

Furthermore, plaintiff-appellant asserts that defendants Bellamy and Rose agreed they would not be billed for any amount due until after the review process was completed. The review process essentially has

never been completed, but at the very earliest it was ongoing until at least 2007 (Appendix F, F 3, para. 21).

Even if defendants Bellamy and Rose had filed a motion to dismiss, the hurdle for dismissal is high.

> When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must accept as true all factual allegations in the complaint and draws inferences from these allegations in the light most favorable to the plaintiff. See, *Scheuer v. Rhodes*, 416 S. 232, 236, 40 L. Ed 2d 90, 94 S. Ct. 1683 (1974), overruled on other grounds. *Davis v. Scheerer*, 468 U.S. 183, 82 L. Ed 2nd 139, 104 S. Ct. 3012 (1982).
>
> .....
>
> Thus, a motion to dismiss under 12(b)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sheppard v. Beerman*, 18 F.3d 147, 150 2d Cir. 1994). In its review of a 12(b)(6) motion to dismiss a court may consider "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." *Samuels v. Air Transport Local 504*, 992 F.2d 12, 15 (2nd Cir. 1993).

*William E. Callahan, Plaintiff, Unisource Worldwide, Inc., ET Al, Defendants*, 2003 U.S. Dist. LEXIS 4787 (D. Conn. March 27, 2003) (Droney, J).

Plaintiff-appellant's concession that, except for the fraud and misrepresentation and CUTPA counts, the claims against defendant Anthem are preempted by ERISA [SO, p. 3] (Appendix C, p. C 3) has nothing to do with the arbitrary erroneous dismissal of the claims the Court of Appeals did not consider in the Summary Order. As the Court of Appeals notes, citing Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002) [SO, p. 3] (Appendix C, p. C 3), all factual allegations are accepted as true and all reasonable inferences are in favor of plaintiff. The District Court simply arbitrarily and erroneously dismissed plaintiff's claims against defendants Bellamy and Rose, who never filed any answer or pleading, or even an appearance, in response to the Complaint.

Therefore, for the above reasons, the District Court, affirmed by the Court of Appeals, is clearly erroneous in invoking Rule 12(b)(6), which, along with the inherent lack of procedural due process in C.G.S. 20-7f(b), formed the basis for dismissal of plaintiff-appellant's claims against Bellamy and Rose.

**3. The District Court denied due process by the prejudicial denial to allow amendment of the Complaint as to defendant Anthem.**

The District Court states in its Ruling, p. 17 (Appendix B, p. B 10), that the denial of leave to amend involves, ""undue delay, bad faith...on the part of the movant,...undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v Davis*, 371 U.S. 178, 182 (1962). The Court finds that such factors are present here.""

A major reason given by the District Court [Ruling On Motion To Dismiss ("Ruling"), pp. 16-17]

(Appendix B, p. B 10) for the denial of plaintiff-appellant's request for leave to amend (placed in the Ruling after the erroneous dismissal of Complaint as to defendants Bellamy and Rose) is that, "Plaintiff has filed numerous unsuccessful suits against insurers and former patients, raising claims similar to those in this suit." This totally erroneous, unsupported assertion is belied by the fact, as documented in the records of the courts, that plaintiff-appellant has prevailed in most similar cases involving patients. Even though the case of State of Connecticut v. Gianetti, CV04-4033348S, is totally irrelevant to the claims against defendant Anthem here, it was noted that defendant Anthem had prejudicially referred to it in its Brief (p. 25) (Appendix D, p. D 3), and by the District Court (Appendix B, p. B 6, fn 3). That case was subsequently settled, with no finding of any illegal act or admission of wrongdoing by plaintiff-appellant. And if C.G.S. Sect. 20-7f(b) is found to be unconstitutional, even more weight would be given to granting leave to amend, as to which Foman v. Davis, 371 U. S. 178, 182 (1962), cited in the district court Ruling [p. 17] (Appendix B, p. B 10), holds that ""*Rule 15(a)* declares that leave to amend "shall be given freely when justice so requires ."""

The District Court is bootstrapping the erroneous findings in reference to defendants Bellamy and Rose in reaching its erroneous conclusion that plaintiff-appellant showed "bad faith". Also, all of the District Court's assertions [Ruling, p. 17] (Appendix B, p. B 8) about time-barring of the fraud and misrepresentation count are incorrect, since fraud not revealed until about 2007, well within the three year statute (Appendix F, p. F 3, paras. 20-21).

As noted in plaintiff-appellant's Brief (p. 24) (Appendix F, p. F 5), most of the decisions in plaintiff-appellant's suits have been favorable to plaintiff-

appellant. No court has ever found against plaintiff-appellant for vexatious suit, including the case with the gratuitous statement [Ruling, p. 17] (Appendix B, p. B 10), "[T]he plaintiff's tactics in filing multitudinous lawsuits, most of which have proven to have no merit, overburden the public courts to further the plaintiff's selfish interests and amount to an abuse of the judicial process." Then bootstrapping on that and on the false premises and assumptions which gave rise to that first erroneous action by the district court, *i. e.*, that there was a violation of C.G.S. 20-7f(b) as to defendants Bellamy and Rose, which there is not [plaintiff-appellant's Brief, pp. 3, 7, 12, 24-25] (Appendix F, pp. F 2-6), the district court held, "The appearance of bad faith on the part of Plaintiff in the filing of this [emphasis added] suit makes the Court disinclined to permit him to amend his Complaint." [Ruling, p. 8] (Appendix B, p. B 11).

Also, if C.G.S. 20-7f(b) is found to be unconstitutional, as plaintiff-appellant has requested, it will of course be of no effect. Even if it were found to be constitutional, there is absolutely no evidence in the record that defendants Bellamy and Rose are enrolled in a managed care plan, or any indication if the services are covered, or if there is a deductible and/or co insurance (Appendix F, F 3-6).

Thus, the District Court is wrongfully denying the plaintiff-appellant one of the most fundamental rights: the right to access to the courts and judicial process. This arbitrary refusal to allow use of the established court processes is invalid even under the most minimal due process standards [*Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)]. Also, amendment of the complaint would allow the plaintiff-appellant to continue to seek the appropriate reimbursement on behalf of defendants Bellamy and Rose.

In *Foman* itself, cited by the District Court *supra*, it is held:

> "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by [*182] counsel may be decisive to the outcome and accept [****226] the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson, 355 U.S. 41, 48.*
>
> *Rule 15 (a)* declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally 3 Moore, Federal Practice (2d ed. 1948); 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.
>
> In the absence of any apparent or declared reason--such such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-- the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant

> the leave without any justifying reason appearing for the denial is not an excuse of discretion and inconsistent with the spirit of the Federal Rules.

Therefore, because of further denial of due process, it is requested that this Court vacate the ruling of the District Court, remand this case, and order that the plaintiff-appellant be granted leave to file an amended complaint as to the ERISA claims.

## CONCLUSION

It is respectfully requested that this Court find that C.G.S. Sec. 20-7(b) is unconstitutional. It is further requested that as to defendants Bellamy and Rose the judgment of the District Court be reversed and that this case be restored to the District Court docket. It is also requested that as to defendant Anthem the judgment of the District Court be reversed and that this case be restored to the District Court docket with further proceedings as to the fraud and misrepresentation and CUTPA counts and reconsideration of plaintiff-appellant's request that leave be granted to file an Amended Complaint as to the ERISA matter.

PLAINTIFF-APPELLANT,

Charles D. Gianetti, M. D.
3715 Main St.
Bridgeport, CT 06606
(203) 374-9251

RETURN DATE: OCTOBER 23, 2007
SUPERIOR COURT, J.D. OF FAIRFIELD
AT BRIDGEPORT
CHARLES D. GIANETTI, M. D.
V
ANTHEM BLUE CROSS AND BLUE SHIELD
OF CONNECTICUT AND SAMARIS ROSE
AND CYNTHIA BELLAMY
SEPTEMBER 17, 2007

COMPLAINT

COUNT ONE: **Breach Of Contract as to Defendant Blue Cross And Blue Shield of Connecticut**

1. Plaintiff Charles D. Gianetti, M. D., is a physician licensed at all relevant times herein by the State of Connecticut, with offices in Bridgeport, Connecticut.

2. Defendant Anthem Blue Cross and Blue Shield of Connecticut, and/or aka Anthem Health Plans, Inc., and Anthem Insurance Companies, Inc. ("Anthem"), is an insurance company with offices in North Haven, Connecticut.

3. Defendant Samaris Rose, a patient of plaintiff and a minor at the time services were performed, resides in Stratford, Connecticut.

4. Defendant Cynthia Bellamy is the mother of Samaria Rose and resides in Stratford, Connecticut

5. On March 10, 1999, and thereafter, plaintiff performed reconstructive plastic surgical and other services for patient defendant Samaris Rode.

6. On or about October 5, 1999, plaintiff sent a statement of charges for services for defendant Samaris Rose with reasonable and customary fees in the amount of $7695., and an Assignment Of Benefits to plaintiff, to defendant Anthem.

APPENDIX A

7. In or about October 2000, plaintiff received a payment of $3019.50 from Anthem.

8. Defendant Anthem stated that an additional payment of $780.50 had erroneously been made to defendant(s) Cynthia Bellamy and/or Samaris Rose.

9. Defendant Anthem also denied $320.00 in charges as not covered.

10. Plaintiff requested payment of $3575. , the remaining amount of charges that are defendant Anthem's responsibility, from Anthem.

11. Despite numerous inquiries and appeals by plaintiff, Anthem has failed and refused to pay the amount due.

12. Plaintiff has been harmed thereby.

COUNT TWO: **Breach of Contract as to defendants Cynthia Bellamy and Samaris Rose**

1.-11. Paragraphs 1-11 of Count One are incorporated by reference as Paragraphs 1-11 of Count Two.

12. Defendants Cynthia Bellamy and Samaris Rose agreed that plaintiff would not send them a statement as to the amount due, if any, until after any payment(s) by Anthem, and after the outcome of the review process.

13. Defendant Anthem submitted a letter in reference to the review process on or about May 7, 2007.

14. Plaintiff sent a statement of the amount due of $4675.50 to defendants Cynthia Bellamy and Samaris Rose.

15. Defendants Cynthia Bellamy and Samaris Rose signed a statement, which reads in pertinent part, "I understand that I am responsible for the payment of all fees regardless of insurance."

16. Defendants Cynthia Bellamy and Samaris Rose have failed and refused to pay the amount due.

17. Plaintiff has been harmed thereby.

**COUNT THREE: Quantum Meruit as to all defendants**

1.-27. Paragraphs 1-11 of Count One and Paragraphs 1-16 of Count Two are incorporated by reference as Paragraphs 1-27 of Count Three.

28. The reasonable value of the plaintiffs services is $7695.

29. All defendants have received the value of plaintiff's services.

30. All defendants have failed and refused to pay the remaining amount due for services.

31. Plaintiff has been harmed thereby.

COUNT FOUR: **Unjust Enrichment as to all defendants**

1-31. Paragraphs 1-31 of Count Three are incorporated by reference as Paragraphs 1-31 of Count Four.

32. Defendants Samaris Rose and/or Cynthia Bellamy have received payment(s) for the plaintiffs services.

33. Defendant Anthem has not make further payment for the plaintiffs services which were provided to subscribers of Anthem's health plan.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHARLES D. GIANETTI, M.D.,
Plaintiff;

v. Case No:
3:07cv01561(PCD)

BLUE CROSS AND BLUE SHIELD OF :
CONNECTICUT, INC., ET AL
Defendants.

**RULING ON MOTION TO DISMISS**

Plaintiff Charles D. Gianetti, M.D. brought this action against Defendants Blue Cross and Blue Shield of Connecticut, Inc., Anthem Health Plans, Inc., Anthem Insurance Companies, Inc., (collectively, "Defendant Anthem" or "Anthem"), as well as Defendants Samaris Rose ("Rose") and Cynthia Bellamy ("Bellamy"), in Bridgeport Superior Court for state law claims of breach of contract, quantum meruit, unjust enrichment, fraud and misrepresentation, and violations of Connecticut Unfair Trade Practices Act ("CUTPA"). Defendant Anthem removed the action to this Court on the grounds that Plaintiff's claims are preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. (2000) ("ERISA") and the claims raise substantial federal questions. Defendant Anthem filed a Motion to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons stated herein, the Motion to Dismiss [Doc. No. 9] is **granted** as to all claims and all Defendants.

**I. BACKGROUND**

For purposes of deciding this motion, the following factual allegations are assumed to be true. *See Miree v. DeKalb County*, 433 U.S. 25, 27 n.2 (1977). Plaintiff's explanation of the facts is less than clear, but the Court gathers the following. On March 10, 1999, Plaintiff, a physician in the State of Connecticut, performed reconstructive plastic surgery and other services

> on Rose, a minor child at the time of the surgery, who was named as a defendant in Plaintiff's state law complaint. (Compl. Count 1 ¶¶ 1, 5.) Bellamy, also so named, is the mother of Rose. (Compl. Count 1 ¶¶ 3, 4.) As of the date of these medical procedures, Bellamy and Rose were covered by an employer sponsored health benefit plan operated by Anthem and governed by ERISA. According to Plaintiff, Bellamy and Rose signed a statement acknowledging their responsibility for payment of all fees regardless of insurance, and agreed that Plaintiff would not send them a statement of charges until Defendant Anthem paid Plaintiff and completed its review process. (Compl. Count 2 ¶¶ 11, 15.)

Plaintiff subsequently sent Defendant Anthem: (1) a statement of charges for services performed on Rose, in the amount of $7,695; and (2) the patient's assignment of benefits to Plaintiff. (Compl. Count 1 ¶ 6.) Defendant Anthem remitted a payment of $3,019.50 to Plaintiff, stated that it had erroneously remitted a payment to Rose and/or Bellamy, and denied part of Plaintiff's charges as not covered. (Compl. Count 1 ¶¶ 7, 8, 9.) According to the Plaintiff, Defendant Anthem maintains that it made payments to Bellamy and Rose, but Plaintiff states that Bellamy and Rose

have denied receiving such payments. (Compl. Count 5 ¶¶ 24, 26, 27.) Furthermore, Plaintiff asserts that a September 8, 2000 statement does not reflect Defendant Anthem's payment to Bellamy and Rose or to Plaintiff. (Compl. Count 4 ¶¶ 24, 25.)

Plaintiff made numerous requests to Anthem for the remaining charges, and sent a statement of amount due to Bellamy and Rose. (Compl. Count 1 ¶¶ 10, 11; Compl. Count 2 ¶ 14.) Plaintiff reports that Bellamy and Rose have refused to pay the amount due to Plaintiff.

Defendant Anthem states that the plan in question is an employer sponsored health benefit plan governed by ERISA. (Aff. of Linda Brink ¶¶ 4, 5.) Plaintiff does not dispute this assertion, and the Court accepts it as true for the purposes of this ruling.

(Compl Count 2 ¶ 16.) Despite having stated that Rose's records had been purged from its files, Defendant Anthem's employee subsequently submitted a listing of the claim's disposition. (Compl. Count 5 ¶¶ 30, 31.)

On September 17, 2007, Plaintiff brought this action in Bridgeport Superior Court against Anthem, Rose, and Bellamy. The complaint alleges breach of contract, quantum meruit, and unjust enrichment against all Defendants, and fraud and misrepresentation and violation of CUTPA against Defendant Anthem. Plaintiff prays for monetary damages, costs, interest, and punitive damages.

On October 24, 2007, Defendant Anthem removed the action to this Court stating that removal was appropriate on the grounds that Plaintiff's claims are preempted by ERISA and the claims raise substantial federal questions.' (Def. Anthem's Pet. for Removal 2.) On November 27, 2007, Plaintiff was granted leave for extension of time to respond to the notice of removal, though he did not subsequently file a response. On January 24, 2008, Defendant Anthem filed a motion to dismiss on the grounds that Plaintiff's state law claims are preempted by ERISA. Plaintiff requested and was granted an extension of time until March 14, 2008 to file an objection. On March 17, 2008, without leave from the court, Plaintiff filed a late objection to the motion to dismiss. In deference to Plaintiff's *pro se* status,[3] the Court has considered the arguments therein notwithstanding the late filing

2Bellamy and Rose never joined Defendant Anthem's Notice of Removal. Defendant Anthem informed the Court that Bellamy and Rose were contacted by Defendant Anthem regarding the Notice of Removal and they took no position on removal. (Def. Anthem's Removal Statement 5.) Remand to State court is not appropriate on this ground because Bellamy and Rose have waived any objection to removal by their failure to respond. *See Allstate Ins. Co. v. Zhugun*, No. 03 Civ. 10302, 2004 WL 187147, at *3 n.2 (S.D.N.Y. Jan. 30. 2004) (citing *Loftis v. United Parcel Service, Inc.*, 342 F.3d 509, 516-517 (6th Cir. 2003); *Parrino v. FHP*, 146 F.3d 699, 703 (9th Cir. 1998)) ("Failure to comply with the rule of unanimity in a notice of removal, is, unlike lack of subject matter jurisdiction, a procedural defect that is waived thirty days after the notice of removal is filed.").

## II. STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) must be decided on "facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." *Leonard F. v. Israel Disc. Bank of N.* Y., 199 F.3d 99, 107 (2d Cir. 1999). In deciding a motion to dismiss, well-pleaded facts must be accepted as true and considered in the light most favorable to the Plaintiff. *Patane v. Clark*, 508 F.3d 106, 111 (2d Cir. 2007). The issue in deciding a motion to dismiss is "not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claims." *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir.1995). The factual allegations made in the complaint "must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1959 (2007). This requires the complaint to contain "enough fact to raise a reasonable expectation that discovery will reveal evidence" of the Plaintiff's claim.

*Id.*

## III.DISCUSSION

### A. Jurisdiction

A defendant may only remove an action to a district court if the plaintiff could have

[3]While *pro se*, Plaintiff is in fact an experienced litigator, as he has filed almost 200 cases similar to this one. *See Gianetti v. Suglinger*, No. CV980349830, 2004 WL 1098443, at *4 (Conn. Super. Ct. Apr. 26, 2004). The State of Connecticut has also brought suit against Plaintiff for violations of CUTPA, alleging balance billing of clients in situations similar to those involved here. Complaint, *State of Connecticut v. Gianetti*, No. CV-04-4033348-S (Conn. Super. Ct. Jul. 21, 2004).



Similarly, Plaintiff's state law claims do not satisfy the McCarren-Ferguson Act criteria, and are thus not saved by the savings clause. None of the state law claims presented here transfer or spread policyholder's risk, constitute an integral part of the policy relationship between the insurer and the insured, nor are the laws limited to entities within the insurance industry.

**G. Supplemental Jurisdiction Over Claims Against Bellamy and Rose**

Plaintiff contends that his state law breach of contract, quantum meruit, and unjust enrichment claims against Bellamy and Rose are not preempted by ERISA. (Obj. to Mot. to Dismiss 1.) Indeed, Plaintiff's state law claims against Bellamy and Rose are not preempted by ERISA because they improper defendants to an ERISA suit. The Second Circuit has held that "in a recovery of benefits claim, only the plan and the administrators and trustees of the plan in their capacity as such may be held liable." *Crocco v. Xerox Corp.*, 137 F.3d 105, 107 (2d Cir. 1998) (quoting *Leonelli v. Pennwalt Corp.*, 887 F.2d 1195 (2d Cir. 1989)). Plaintiff does not suggest that Bellamy and Rose are administrators nor trustees of the plan, and therefore, as plan participants, Bellamy and Rose are improper defendants to this ERISA suit.

This Court has supplemental jurisdiction over Plaintiff's state law claims against Bellamy and Rose. "In any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties." 28 U.S.C. § 1367(a) (1990). Accordingly, "28 U.S.C. § 1367(a) . . . makes pendent party jurisdiction possible where the claim in question arises out of the same set of facts that give rise to an anchoring federal question claim



against another party." *Kirschner v. Klemons,* 225 F.3d 227, 239 (2d Cir. 2000); *see also City of Chicago v. Int'l Coll. of Surgeons,* 522 U.S. 156, 164 (1997) (holding state law claims form part of the same case if they and the federal claims "derive from a common nucleus of operative fact").

Plaintiff's claims against Defendants Anthem, Bellamy and Rose arise from the same operative facts. Plaintiff could not have a claim against Anthem without the assignment of Bellamy and Rose's ERISA-governed rights and benefits to Plaintiff, nor could he have a claim against Bellamy and Rose without Anthem's denial of charges. Plaintiff's claims against Anthem, Bellamy, and Rose all arise out of their alleged failure to compensate Plaintiff for the services

performed on March 10, 1999. (Compl. Count 1 ¶¶ 5, 11; Compl. Count 2 ¶ 16.) Since Plaintiff's state law claims against Bellamy and Rose derive from the same set of facts as his federal claims against Anthem, the Court has supplemental jurisdiction over Plaintiff's state law claims against Bellamy and Rose.

## II. Count Two, Three, and Four: Breach of Contract, Quantum Meruit, and Unjust Enrichment as to Bellamy and Rose

Plaintiff alleges that minor child Rose and her mother, Bellamy, had signed a contract with Plaintiff stating that they were "responsible for the payment of all fees [in connection to the March 10, 1999 medical care] regardless of insurance." He further alleges that they breached the contract by failing to remit payment for the services he performed after Anthem denied payment and completed its review process. (Compl. Count 2 11 12-17.) Plaintiff also makes claims against Bellamy and Rose for quantum meruit and unjust enrichment.

Bellamy and Rose are not liable under this contract. Connecticut General Statutes 20-7f(b) provides: "It shall be an unfair trade practice in violation of Chapter 735a [Conn. Gen. Stat. § 42-110a, et seq.] for any health care provider to request payment from an enrollee, other than a co-payment or deductible, for medical services covered under a

managed care plan." Furthermore, Plaintiff has been instructed by Connecticut state courts that "he cannot engage in balance billing for covered services." *Gianetti v. Siglinger,* No. CV980349830, 2004 WL 1098443, at *4 (Conn. Super. Ct. Apr. 26, 2004); *see also Gianetti v. Siglinger,* 900 A.2d 520, 524 (Conn. 2006) ("[P]laintiff was well aware that the practice [of balancing billing] was prohibited through court decisions and statutes."). Therefore, with respect to his claims against Bellamy and Rose, Plaintiff has failed to state a cause of action upon which relief can be granted. Plaintiff's claims against Bellamy and Rose may also be time-barred, given that the medical procedures took place in March 1999 and Plaintiff did not file his complaint until September 2007.[4] For the reasons stated herein, Plaintiff's claims against Defendants Bellamy and Rose are **dismissed** pursuant to Federal Rule of Civil Procedure 12(b)(6).

### 1. Plaintiff's Request to Amend the Complaint

Plaintiff requests that the Court consider his claims as if they had been made under ERISA or, in the alternative, grant him leave to amend his complaint. (Pl.'s Obj. to Mot. to Dismiss 3.) Defendant Anthem objects to this request. (Def.'s Reply in Supp. of Mot. to Dismiss 7 n.1.) The Court declines to grant Plaintiff leave to amend his complaint, nor will the Court consider ERISA claims that Plaintiff has not pled. When, as is the case here, a party cannot amend the complaint as a matter of course, the party "may amend its pleading only with

4

The applicable Connecticut statute of limitations for breach of contract, quantum meruit, and unjust enrichment is six years. Conn. Gen. Stat. § 52-576(a). While Plaintiff's Complaint fails to state the date of the alleged contract, it seems reasonable to assume that it was signed on or about the date of the procedures to which it relates.



the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). The Court's discretion is properly exercised to deny leave to amend in the presence of an "apparent or declared reason," including "undue delay, bad faith...on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis,* 371 U.S. 178, 182 (1962). The Court finds that such factors are present here.

As noted previously, Plaintiff has filed numerous unsuccessful suits against insurers and former patients, raising claims similar to those in this suit. *See Gianetti v. Siglinger,* 900 A.2d 520, 524 (Conn. 2006) ("[T]he trial court noted other litigation arising out of the plaintiff's practice of balance billing and concluded that the plaintiff was well aware that the practice was prohibited through court decisions and statutes."). *See also Gianetti v. Greater Bridgeport Individual Practice Ass 'n,* 2005 WL 2078546, n.15 (Conn. Super. July 21, 2005) ("[T]he plaintiff's tactics in filing multitudinous lawsuits, most of which have proven to have no merit, overburden the public courts to further the plaintiff's selfish interests and amount to

an abuse of the judicial process."). The appearance of bad faith on the part of Plaintiff in the filing of this suit makes the Court disinclined to permit him to amend his Complaint. Furthermore, the incidents underlying Plaintiff's allegations against Anthem took place between 1999 and 2001, and thus it appears that Plaintiff's claims against Anthem, raised in 2007, are likely time-barred, which would render amendment futile.[5] Plaintiff's request for leave to amend his Complaint *is* denied.

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"As ERISA does not prescribe a limitations period for actions under § 1132, the controlling limitations period is that specified in the most nearly analogous state limitations statute." *Miles v. N.Y. State Teamsters Conference Pension & Ret. Plan*, 698 F.2d 593, 598 (2d Cir. 1983). Here, the applicable statute of limitations are those under Connecticut state law. *See Cole v. Travelers Ins. Co.*, 208 F. Supp. 2d 248, 252 & n.2 (D. Conn. 2002). The applicable Connecticut statutes of limitations are six years for breach of contract, quantum meruit, and unjust enrichment, Conn. Gen. Stat. § 52-576(a); three years for fraud and misrepresentation, Conn. Gen. Stat. § 52-577; and three years for CUTPA violations, Conn. Gen. Stat. § 42-110g(f).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

**At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New**

York, on the 3rd day of November, two thousand nine.

PRESENT: DENNIS JACOBS,
Chief Judge,
AMALYA L. KEARSE,
Circuit Judge
PAUL G. GARDEPHE,*
District Judge.

Plaintiff-Appellant,

08-2747-cv

Blue Cross & Blue Shield of CT., Inc., et *al.*,

Defendants-Appellees.

* Paul G. Gardephe, Judge of the United States District Court for the Southern District of New York, sitting by designation.

APPEARING FOR APPELLANT:
Charles D. Gianetti, pro se, Bridgeport, CT.
APPEARING FOR APPELLEES:
Michael G. Durham, Matthew H. Geelan, Donahue, Durham & Noonan, P.C., Guilford, CT.

Appeal from a judgment of the United States District Court for the District of Connecticut (Dorsey, J.).

**UPON DUE CONSIDERATION IT IS HEREBY ORDERED, ADJUDGED,**

**AND DECREED** that the judgment of the district court be

**AFFIRMED.**

Appellant Charles D. Gianetti, pro se, appeals the district court's dismissal of his complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief can be granted, as well as its refusal to grant him leave to amend his complaint. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

As a preliminary matter, because Gianetti does not challenge the district court's dismissal of his breach of contract, quantum meruit, and unjust enrichment claims, we deem those claims abandoned. See LoSacco v. City of Middletown, 71 F.3d 88, 92-93 (2d Cir. 1995). Because Gianetti did not argue before the district court that Conn. Gen. Stat. § 20-7f(b) was unconstitutional, we decline to consider that claim or his related argument that the dismissal of his complaint violated his due process rights because it prevented him from challenging the constitutionality of that state law. See Singleton v. Wulff, 428 U.S. 106, 120-21 (1976).

1. Motion for Leave to Amend. We review the denial of a Motion for leave to amend the complaint for abuse of discretion. Nettis v. Levitt, 241 F.3d 186, 192 (2d Cir. 2001). Here, nothing in the record suggests that the district court abused its discretion by refusing to grant Gianetti leave to amend his complaint. Gianetti's long history of bringing vexatious claims against former patients and insurance providers suggests the appearance of bad faith in the instant complaint.

II. Dismissal under Rule 12(b)(6).

"We review de novo a district court's dismissal of a complaint pursuant to Rule 12(b)(6), construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002). As a preliminary matter, Gianetti concedes that the employee benefit plan at issue governed by Employee Retirement Income Security Act of 1974 ("ERISA"), and that the basis for the instant action is his receipt of an assignment of benefits pursuant to that ERISA-regulated benefit plan. 29 U.S.C. § 1001 *et seq.* Accordingly, the only issue he challenges on appeal is the district court's determination that his fraud, misrepresentation, and Connecticut Unfair Trade Practices Act ("CUTPA") claims were preempted by ERISA.

Gianetti's fraud, misrepresentation, and CUTPA claims concern the existence or extent of benefits under an ERISAregulated employee benefit plan (of which Gianetti is an assignee). As the district court ruled, all of his claims are therefore preempted by ERISA, since, absent the ERISA plan, Gianetti would have no cause of action against the Defendants. Aetna Health inc. v. Davila, 542 U.S. 200, 214 (2004) (where cause of action does not attempt to remedy any violation of a legal duty independent of ERISA, the claim is completely preempted by that statute).

We have considered all of Gianetti's remaining claims of error and found them to be without merit.

For the foregoing reasons, the judgment of the district court is hereby **AFFIRMED.**

A True Copy
United States Court of Appeals, Second Circuit
By_____

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

United States Court Of Appeals For The Second Circuit
Charles D. Gianetti, M. D. Docket No.: 08-2747-cv
v
Blue Cross & Blue Shield of Connecticut, et al
December 16, 2009

PETITION FOR REHEARING EN BANC

Pursuant to Rules 35 and 40 of the Federal Rules Of Civil Procedure, plaintiff/appellant pro se Charles D. Gianetti, M. D., hereby respectfully requests a rehearing en banc for the following reasons. This Court has noted the assumed familiarity with the underlying facts, the procedural history, and the issues on appeal.

A Unconstitutuionality of C.G.S. Sect. 20-7f(b)

As to the "preliminary matter" of the unconstitutionality of C.G.S. Sect. 20-7f(b) (Summary Order ["SO"], pp. 2-3), with its inherent substantive lack of due process, and the prevention of its challenge because it was not argued before the district court, any question of constitutionality did not arise until after the district court's decision, by which the plaintiff/appellant was simply denied any hearing before the district court. Plaintiff/appellant never had the opportunity to present a constitutional argument before the district court.

The Supreme Court held, in Singleton v. Wulff, 428 U.S. 106, 121 (1976), a case cited by this Court:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in

> which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, see *Turner* v. *City of Memphis*, 369 U. S. 350 (1962), or where "injustice might otherwise result." *Hormel* v. *Helvering*, 312 U. S. at 557 [footnote omitted].

This is such a case.

B. Denial of request for leave to amend

A major reason given by the district court [Ruling On Motion To Dismiss ("Ruling"), pp. 16-17, A 71-A 72] for the denial of plaintiff/appellant's request for leave to amend (placed in the Ruling after the erroneous dismissal of Complaint as to defendants Bellamy and Rose and addressed more fully in C. Dismissal under Rule 12(b)(6), *infra*, and substantially based on the erroneous analysis of that matter) is irrelevant to the claims against defendant Anthem to which C.G.S. Sect. 20-7f(b) would not and does not apply under any circumstances. Even defendant Anthem does not claim that C.G.S. Sect. 20-7f(b) applies to it. As noted in plaintiff/appellant's Brief (p. 24), most of the decisions in plaintiff/appellant's suits have been favorable to plaintiff/appellant. No court has ever found against plaintiff/appellant for vexatious suit, including the case with the gratuitous statement [Ruling, p. 17 (A 72)], "[T]he plaintiff's tactics in filing multitudinous lawsuits, most of which have proven to have no merit, overburden the public courts to further the plaintiff's selfish interests and amount to an abuse of the judicial process."

Then bootstrapping on that and on the falsse premises and assumptions which gave rise to that first erroneous action by the district court, *i. e.*, that there was a violation of C.G.S. 20-7f(b) as to defendants

Bellamy and Rose, which there is not[plaintiff/appellant's Brief, pp. 3, 7, 12, 24-25], the district court held, "The appearance of bad faith on the part of Plaintiff in the filing of this [emphasis added] suit makes the Court disinclined to permit him to amend his Complaint."

Even though the case of State of Connecticut v. Gianetti, CV04-000594, is totally irrelevant to the claims against defendant Anthem here, defendant Anthem prejudicially refers to it in its Brief (p. 25). That case was subsequently settled, with no finding of any illegal act or admission of wrongdoing by plaintiff/appellant.

And if C.G.S. Sect. 20-7f(b) is found to be unconstitutional, even more weight would be given to granting leave to amend, as to which Foman v. Davis, 371 U. S. 178, 182 (1962), cited in the district court Ruling [p. 17, A72], holds that ""*Rule 15(a)* declares that leave to amend "shall be given freely when justice so requires ."""

C. Dismissal under Rule 12(b)(6)

This Court does not address the dismissal of the claims as to defendants Bellamy and Rose in its Summary Order.

Plaintiff/appellant's concession that, except for the fraud and misrepresentation and CUTPA counts, the claims against defendant Anthem are preempted by ERISA [SO, p. 3] has nothing to do with the arbitrary erroneous dismissal of the claims against defendants Bellamy and Rose. As this Court notes, citing Chambers v. Time Warner, Inc. [SO, p. 3], all factual allegations are accepted as true and all reasonable inferences are in favor of plaintiff.

The district court simply arbitrarily and erroneously dismissed claims against defendants Bellamy and Rose. Those defendants never filed any

answer or pleading, or even an appearance, in response to the Complaint. Since as clearly and completely set forth in plaintiff/appellant's Brief (pp. 3, 7, 12, 24-25), there is unequivocally no evidence that C.G.S. 20-7f(b) applies to defendants Bellamy and Rose, the claims of plaintiff/appellant in the Complaint were and are proper, viable and valid. Thus, there is absolutely no reason for dismissal of the claims against defendants Bellamy and Rose under Rule 12(b)(6).

As to the claims against defendant Anthem that plaintiff concedes are governed by ERISA, they are the reason plaintiff/appellant requested leave to amend. The reasons leave to amend should be granted are set forth in B. Denial of request for leave to amend, *supra*. Of course, if leave to amend is granted, the dismissal as to defendant Anthem would also be reversed.

D. Fraud, misrepresentation and CUTPA claims

Plaintiff/appellant respectfully disagrees with this Court that the fraud, misrepresentation and CUTPA claims concern the existence or extent of benefits. There is no dispute that benefits exist, and the extent can be determined under the provisions of the plan through an ERISA action under ERISA Sect. 502(a)(1)(B), *e. g.*, if leave to amend the Complaint is granted.

Unlike Aetna Health Inc. v. Davila [SO, p. 4], the only case relied on by this Court as to this issue, plaintiff/appellant's cause of action here attempts to remedy a legal duty independent of ERISA. Distinguishing this case from Aetna Health Inc., among other reasons, is that it does not ""invoke an external, statutorily imposed duty of "ordinary care."" Aetna Health Carev. Davila, 542 U. S. 200, 215 (2004). The illegal acts of defendant would

exist for any type of plan whether or not it is an ERISA plan, as asserted in plaintiff appellant's Brief (pp. 17-18) and at the hearing before this Court.

Although plaintiff/appellant had not yet obtained the contract between defendant Anthem and defendants Bellamy and Rose at the time of dismissal of this case, plaintiff/appellant is essentially certain there is nothing in the health care contract which would sanction the acts of fraud and misrepresentation on the part of defendant Anthem.

As set forth in plaintiff/appellant's Brief (pp. 16-22), and argued before this Court, the availability of coverage, the extent of coverage and/or the amount of coverage are not in dispute as related to the fraud and misrepresentation and CUTPA claims. It is inconceivable that Congress would have intended to allow acts such as those of defendant Anthem to be hidden and/or evaded by an ERISA smokescreen. Plaintiff/appellant requests reversal of the ruling as to the fraud and misrepresentation claims, thus also of the CUTPA claim.

Therefore, for the above reasons, a rehearing en banc is requested.

PLAINTIFF/APPELLANT,

Charles D. Gianetti, M. D.
3715 Main St.
Bridgeport, CT 06606
(203) 374-9251

CERTIFICATION

This is to certify that on the above date a copy of the foregoing was mailed by first class mail, postage prepaid, to Cynthia Bellamy and Samaris Rose, 398 Birdseye St., Stratford, CT 06615 and Michael Durham, Donahue, Durham & Noonan, P. C., 741 Boston Post Rd., Guilford, CT 06437.

_____

Charles D. Gianetti, M. D.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 17th day of February, two thousand ten.**

**CharlesD.Gianetti,M.D.**
**Plaintiff-Appellant,** *v.*
**Blue Cross & Blue Shield of CT., Inc., et *al,***

**Defendants-Appellees.**

Charles Gianetti having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPENDIX E

08-2747-cv

UNITED STATES COURTS OF APPEALS
FOR THE SECOND CIRCUIT

Charles D. Gianetti,M.D..,Plaintiff-Appellant

Blue Cross & Blue Shield of CT., Inc., Et Al,
Defendants-Appellees

On Appeal from the United States District Court. for District of Connecticut (New Haven)

# Brief and Appendix of the Plaintiff-Appellant Charles D. Gianetti, M.D.

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APPENDIX F 1

## STATEMENT OF THE CASE

Plaintiff Charles D. Gianetti, M.D., brought this action against defendants Blue Cross and Blue Shield of Connecticut, Inc., Anthem Health Plans, Inc., Anthem Insurance Companies, Inc., (collectively, "Defendant Anthem" or "Anthem"), as well as defendants Samaris Rose ("Rose") and Cynthia Bellamy ("Bellamy"), in Bridgeport Superior Court for state law claims of breach of contract, quantum meruit, unjust enrichment, fraud and misrepresentation, and violations of the Connecticut Unfair Trade Practices Act ("CUTPA"). Defendant Anthem removed the action to the District Court on the grounds that plaintiff's claims are preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sec. 1001, *et seq.* (2000) ("ERISA") and the claims raise substantial federal questions. Defendant Anthem filed a Motion to Dismiss the Complaint pursuant toFederal Rules of Civil Procedure 12(b)(6). Defendants Cynthia Bellamy and Samaris Rose have not appeared, and have not filed any pleading, including a motion to dismiss. A motion to dismiss was granted as to all claims and all defendants, by the United States District Court, District of Connecticut, Judge Peter C. Dorsey.

20. On August 12, 2005, "Phil," an employee of defendant Anthem, stated, *inter alia*, that all records for defendant Rose had been purged from the files of defendant Anthem [Com, Cnt 5, Par 30].

21. On or about May 8, 2007, Marilyn Waterbury, an employee of defendant Anthem, submitted a listing of the alleged entire disposition of the claim for defendant Rose [Com, Cnt Five, Par 31].

22. Defendant Anthem had maintained in or about 2001 that on 6/13/00 it made a payment of $420.00 to the member, for the same CPT Code 14041 in 16., above [Com, Cnt. Five, Par 24].

23. Defendants Bellamy and Rose deny receiving said payment of $420.00 [Com, Cnt. Five, Par 27].

24. There is no accounting of the alleged payment of $420.00 in the 9/08/00 alleged statement of payments that defendant Anthem sent to plaintiff [Com, Cnt. Five, Par 25].

25. There is no indication in the pleadings of defendant Anthem, or anywhere else in the record, that the subject benefit plan is a managed care plan.

26. Plaintiff-appellant requested oral argument on the [Objection To Motion To Dismiss ("Obj p. 1).]

27. As a third party provider, Plaintiff-appellant was a non-participating physician in defendant Rose's health benefit plan. [Mot. p. 10; Obj. p. 6].

plaintiff appellant, have the right to negotiate a contract, but a patient also has the right to become a party to a contract which they deem to be in their best interest.

The Fourteenth Amendment further holds, "...nor shall any State deprive any person of life, liberty, or property, without due process of law..." C.G.S. Sec. 20-7f(b) thereby has an additional inherent lack of substantive due process in simply arbitrarily proscribing any action to secure payment to which a party is otherwise entitled.

In this case there is no allegation or any indication whatsoever that the insurance coverage for defendant Rose involves a managed care plan.

The right of private property is a fundamental [*New York State Commission v. Pelham Hall Apartments, Inc.* 10 Misc. 2d 334, 170 N.Y.S.2d 750 (Sup. 1958)] sacred, natural, inherent, and inalienable right, the protection of which is one of the most important purposes of government. It is a common law
right, which existed before the adoption of the federal and state constitutions [*Grubel v. MacLaughlin*, 286 F. Supp. 24 (D.V.I. 1968)], and is not dependent on them for its existence [*Culp v. U. S.*, 131 F.2d 93 (C.C.A. 8th Cir. 1942)]. The constitutional right of private property embraces every species of property recognized by law with all right incident thereto and as protected by
the various constitutions, property is more than a mere thing which a person owns [*U.S. v. Carolene Products Co*, 7 F. Supp., 500 (S.D. Ill.1934)].

futility of amendment." *Foman v Davis*, 371 U.S. 178, 182 (1962). The Court finds that such factors are present here.""

The District Court states in its Ruling [p. 17] that, "Plaintiff has filed numerous unsuccessful suits against insurers and former patients, raising claims similar to those in this suit." This totally erroneous, unsupported assertion is belied by the fact, as documented in the records of the courts, that plaintiff-appellant has prevailed in most similar cases involving patients. The District Court is bootstrapping the erroneous findings in reference to defendants Bellamy and Rose in reaching its erroneous conclusion that plaintiff-appellant showed "bad faith". Also, all of the District Court's assertions [Ruling, p. 17] about time-barring of the fraud and misrepresentation count are incorrect, since concealment was not revealed until about 2005 [Statement of Facts, 20.], well within the three year statute.

Thus, the District Court is wrongfully denying the plaintiff/appellant one of the most fundamental rights: the right to access to the courts and judicial process. This arbitrary refusal to allow use of the established court processes is invalid even under the most minimal due process standards [*Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)]. Also, amendment of the complaint would allow the plaintiff-appellant to continue to seek the appropriate reimbursement on behalf of defendants Bellamy and Rose. There is

absolutely no evidence in the record that defendants Bellamy and Rose are enrolled in a managed care plan. Furthermore, there is no indication if any of the services are not covered, or if there is a deductible and/or co-insurance.

In *Foman* itself, cited by the District Court *supra*, it is held:

> "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by [*182] counsel may be decisive to the outcome and accept [****226] the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson, 355 U.S. 41, 48.*
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> *Rule 15 (a)* declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally 3 Moore, Federal Pactice (2d ed. 1948), 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.
>
> In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely given."